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IN THE

Supreme Court of the United States

October Term, 1940

No. 251

MILLINERY CREATOR'S GUILD INC. (formerly MILLINERY QUALITY GUILD, INC.), DAVE HERSTEIN COMPANY, G. HOWARD HODGE, EDGAR J. LOWE, INC., L. G. MEYERSON, INC., VOGUE HAT CO., HARRY SOLOMONS and MAY F. SOLOMONS, co-partners trading as "HARRY SOLOMONS AND SONS",

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS.

LOWELL M. BIRRELL,
Attorney for Petitioners,
27 Cedar Street,
New York, N. Y.

Of Counsel:
CHARLES A. VAN PATTEN.

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Judicial Code

44 Stat. 587 (28 U. S. C. A. 348) 1

Sherman Act

26 Stat. 209 as amended by 50 Stat. 963 (15 U. S. C. A. 1, 2) 2, 3, 31, 34

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. * * *"

* * * * * * * *

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *"

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Statement.

This appeal comes before this Court by certiorari granted the 14th day of October, 1940 (R. p. 189). Jurisdiction was invoked under 44 Stat. 587 (28 U. S. C. A. 348). The order presented for review is an order by the Circuit Court of Appeals, Second Circuit, affirming a Cease and Desist order of the Federal Trade Commission. The opinion below by CLARK, J. is found in 109 F. (2d) 175. The decision is in conflict with the decision of the Circuit Court of Appeals, First Circuit, in *Wm.*

Filene's Sons v. *Fashion Originator's Guild,* 90 F. (2d) 556, affirming 14 Fed. Supp. 353.

The question presented is as to whether co-operative endeavor by certain milliners to eliminate "style piracy" from the trade is an unfair method of competition under the Federal Trade Commission Act.[1] Decision of that question depends upon whether or not a certain plan for dealing with a trade abuse known as "style piracy" is a violation of the Federal Anti-Trust legislation known as the Sherman Act.[2]

The Federal Trade Commission and the Court below have decided that the plan is a violation of the Sherman Act (R. pp. 7-16, 185-187, 177-182). The Circuit Court of the First Circuit has held that it is not. *Wm. Filene's Sons Co.* v. *Fashion Originator's Guild,* 90 F. (2d) 556, affirming 14 Fed. Supp. 353. The Court below has affirmed a sweeping Cease and Desist order as against virtually any method of co-operative endeavor to eliminate "style piracy" (R. pp. 186-187).

It is urged that the Circuit Court of Appeals erred:

(1) By affirming said "Cease and Desist" order.

(2) By affirming the finding and conclusion of Federal Trade Commission that petitioners' plan for the elimination of "Style Piracy" is a violation of the Sherman Anti-Trust Act.[2]

(3) By finding that "Style Piracy" is a socially desirable form of competition.

Petitioners further urge that neither the plan of eliminating "style piracy" nor the methods to be used in reach-

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[1] 38 Stat. 719 amended by 43 Stat. 939, 52 Stat. 111; 15 U. S. C. A. Sec. 45. (Quoted from in Index.)

[2] 26 Stat. 209 amended by 50 Stat. 693; 15 U. S. C. A. Secs. 1 and 2. (Quoted from in Index.)

ing this result are an unfair method of competition under the Federal Trade Commission Act,[1] or a violation of the Sherman Act[2] and that the orders below should be reversed. In fact, petitioners urge that it is "style piracy" which is the unfair method of competition and that, accordingly, their efforts are in furtherance of the purpose of the Federal Trade Commission Act.[1]

TOPIC A.

Analysis of "Style Piracy".

Women do not buy hats. They buy fashion. It is difficult to find any utilitarian purpose in a large majority of women's hats. They most certainly do not protect the wearer against rain or snow or cold. Virtually their sole function is to make the wearer happy in the thought that she has a beautiful thing which is in fashion. Here the emphasis should be on the word "fashion", for no matter how beautiful, if not in fashion, the hat will not sell. In fact, these whims of fashion conjure up such oddities from a purely esthetic point of view, that women's hats are a constant source of humor to the men of the nation. Nevertheless, as Mr. Justice HOLMES has said,[3] "the taste of any public is not to be treated with contempt". Men may joke, but it is this curious quality of "fashion" which sells hats (R. p. 92) and it is, therefore, of great economic value. (See opinion below R. p. 179.)

A woman buying a hat knows the approximate maximum price which she will consider paying and she demands a certain standard of quality. Within these very general limits, price and quality have little bearing upon her selec-

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[3] *Bleistein* v. *Donaldson Litho. Co.*, 188 U. S. 239, 252.

tion.[4] She will buy the hat she thinks to be most "stylish" even though it be more expensive and of poorer quality than the others she sees and even, at times, though it be not particularly becoming or suitable.[5] She buys fashion not goods.

But while the woman who buys the hat requires that it be in fashion—that is to say, in the newest fashion, she also requires something more. She wants it to be distinctive—that is to say, her hat. It must be different from other hats she sees, so that it will be her hat. But the difference must be subtile for, if it were not of the general style, it would not be in fashion and, therefore, would not be desirable to her.[6] This quality of distinctiveness can be maintained only through careful distribution. The number of duplications of a hat must not be too great in any particular area for otherwise women will see their hats "walking down the street" which they do not like. On the other hand, immediate and indiscriminate wholesale duplication, particularly when it is accompanied by a lower standard of quality, is lethal. Thus, it is that the "style pirate" destroys the value of the original by destroying its distinctiveness. The battle against the "style pirate" is not so much a battle for customers or markets as it is an effort to prevent him from ruining the goods of the originator at the point which is most vulnerable and, at the same time, of greatest economic value.[6] To attain this quality of distinc-

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[4] It is stipulated that the "style element is the most important factor in the sale of ladies' hats" (R. p. 92). Worthy in his N. R. A. studies of the millinery industry quotes M. D. C. Crawford, Consumer's Advisor to the Millinery Code to the effect that at least 70% of the value of any piece of outer clothing consists of the intangible in the woman's mind, namely, style—Worthy N. R. A. Works Materials Div. 1936 Bulletin 53, p. 35. Appendix, p. 44.

[5] For a treatise on this powerful economic factor see Nystrom—"The Economics of Fashion". Ronald Press (1928).

[6] Nystrom—Fashion Merchandising (Ronald Press, 1932), p. 222.

tiveness in fashion, the originator makes a large investment by employing skilled designers whom he sends to Europe for inspiration and to keep abreast of the news of fashion (R. p. 92) and almost overnight, unless there be protection, the "style pirate" can reap where he has not sowed, and in doing so, destroy the benefits of the skill, labor and the expenditure of the originator.

Before proceeding to define "style piracy" it is well to pause for a definition of a number of terms which are often loosely used and, therefore, confusing. Thus, the phrase "style piracy" is in reality inaccurate irrespective of the appropriateness of the term "piracy". One would more properly say "design pirate". This is because a "style" is a general term referring to a characteristic or distinctive artistic expression, whereas a "design" is a particular or individual interpretation of a "style". "Fashion" is merely a "style" which is accepted and used by people. In order for an object to be "novel" it must be new as compared with all pre-existing things, but to have "trade novelty" it need not be new in the absolute sense—it need only be new as far as the particular trade is concerned. Finally, "originality" means that the design, while not necessarily new in the absolute sense, is new and creative as far as he who thought of it is concerned.[7]

Thus, a "style" of hat might be a Burmese Pagoda motif and this might be in "fashion" in a particular season. Such "style" would not be "novel" in the absolute sense but, if new in millinery, it would have "trade novelty". If a particular designer were to suspend bells from the brim, indent the peak of the pagoda, or make any one of thousands

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[7] The foregoing definitions are from Nystrom—"The Economics of Fashion" (1928) as adopted by Johnston & Fitch in their N. R. A. report on Design Piracy, N. R. A. Work Materials Division (1936) Bulletin No. 52, pp. 11-12. See also *Wm. Filene's Sons Co.* v. *Fashion Originator's Guild*, 90 F. (2d) 556.

of possible modifications of shape, color or decoration, that would produce a "design" and if the idea were new to him, the hat would have "originality".

It is thus apparent that in this discussion we are primarily concerned with "designs" which have "originality" and it is here that the "design pirate" strikes. He is as free as anyone to create his own designs and, as we will see, his designs will receive the same protection as that of Guild members (R. pp. 93, 80). But instead, he acts as a parasite—thriving upon the efforts of his host, maiming and eventually killing the economic value of the product of the host.

The originating house maintains an expensive organization (R. p. 92). It must not only employ highly paid designers, but it must send them to centers of fashion throughout the world to keep abreast of fashion trends and for inspiration (R. p. 92). It is upon the skill and inspiration acquired through such an organization that the design pirate feeds.

Thus it is that Callman, in his criticism of the decision below,[8] says of "design piracy" that it is the "intentional systematic appropriation of a business equipment and organization";[9] and it is against this practice that the Guild members have sought to protect themselves.

Shortly after the decision of the Federal Trade Commission in this case, results of extensive research on the subject by Millinery Stabilization Committee came to our attention and we sought reargument to present this data upon the ways and methods of the "design pirate" as well as the

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[8] Callman—Style and Design Piracy—Journal of the Patent Office Society, August, 1940, pp. 557, 583-584.

[9] Nystrom likewise emphasizes that design piracy is a systematic way of doing business by appropriation of the business organization of the originator. Fashion Merchandising, pp. 218-219.

effects of his practices (R. p. 38). The Commission, however, refused to receive evidence based upon these studies (R. p. 39).

An excellent description of "design piracy" is contained in the Special Master's report in *Wm. Filene's Sons* v. *Fashion Originator's Guild,* 14 Fed. Supp. 353. His conclusions, after considering a mass of evidence, are concisely restated by the Circuit Court (90 Fed. (2d) 556, 558) as follows:

> "'A manufacturer who is a copyist does not send stylists or designers to Paris for inspiration. Instead he copies original designs of other manufacturers, which is accomplished in different ways. Sometimes a copyist buys dresses from retailers who have purchased them from original creators. Sometimes employees of copyists visit the showrooms of original creators and memorize or take notes of the details of the original design there displayed. Sometimes copyists obtain sketches or photographs of successful designs of original creators from agencies which make a business of supplying such sketches and photographs. Sometimes copyists bribe employees of original creators to furnish samples of their employers' original designs or to let them see samples from which they make sketches, and occasionally the original designs are stolen from the original creators.[10]
>
> "Copying destroys the style value of dresses which are copied. Women will not buy dresses at a good price at one store if dresses which look about

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[10] Substantially the same description is contained in Worthy—N. R. A. Work Materials Div. (1936) Bulletin 52, p. 33. Appendix, p. 40. A more detailed description is found, however, in Nystrom—Fashion Merchandising. Nystrom's summary of the methods of the copyist is:

> "Most of the methods are so crude and so frankly dishonest, that if used in taking ordinary merchandise would brand the copyist as a common thief."

the same are offered for sale at another store at half those prices. For this reason, copying substantially reduces the number and amount of reorders which the original creators get. With this uncertainty with respect to reorders, original creators cannot afford to buy materials in large quantities as they otherwise would. This tends to increase the cost of their dresses and the prices at which they must be sold.

"Reputation for honesty, style and service is an important asset of retailers. Copying often injures such a reputation. A customer who has bought a dress at one store and later sees a copy of it at another store at a lower price is quite likely to think that the retailer from whom she bought the dress lacks ability to select distinctive models and that she has been overcharged. Dresses are returned and customers are lost."

A more concise definition, as quoted by Worthy, N. R. A. Work Materials Div. (1936) Bulletin 53, page 32, (Appendix p. 39) from the report of A. C. Johnston, N. R. A. Trade Practices Studies, "Style Piracy Study", is as follows:

"Style Piracy * * * consists in the copying, without authorization from the creator or producer, of ornamental designs for industrial products created or introduced by others, and the selling in competition with such creator or producer, of products embodying the copied designs."

But these definitions fail to mention one important factor in the practice known as design piracy. As Nystrom correctly points out, it is not copying in itself but copying too soon and without remuneration which, when practiced as a business, constitutes design piracy.[11] Creators do not object to copying except when the design is fresh and new.

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[11] Nystrom—Fashion Merchandising, p. 23.

TOPIC B.

The Social and Economic Effects of Style Piracy.

It is indeed fortunate that the Court, in deciding the question here presented, which affects not only a large industry but nearly all the women of the nation, may have the benefit of a thorough and unbiased government report based upon exhaustive research in the millinery industry. This report is by James C. Worthy and a number of collaborators. It is found in N. R. A. Work Materials Division (1936) Bulletin #53. A copy of the section dealing with design piracy is annexed as an Appendix for the convenience of the Court. A further exhaustive study of the subject of design piracy as it affects various industries, including millinery, is by Johnston and Fitch and is found in N. R. A. Work Materials Division (1936) Bulletin #52. Another most significant work on the subject is Nystrom, "Fashion Merchandising (1932)" particularly Chapter 14 entitled, "The Protection of Design in the Fashion Industries" and Nystrom "The Economics of Fashion (1928) is well worth perusal.

The social and economic factors involved in design piracy and its regulation must be considered from the point of view of the public at large, the retailer, the originator and the "design pirate".

From the point of view of the public at large, it can hardly be urged that a disreputable practice, identical with larceny except for legal technicalities as to the tangibleness of the article appropriated, can be a public benefit. There is no dispute as to the unethical nature of the practice.[12]

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[12] Johnston & Fitch (N. R. A. Work Materials Div. (1936) Bulletin 52, p. 57) cites this as a point of agreement of all parties. Both the First Circuit and the Court below recognize that the practice is unethical (*Wm. Filene's Sons Co.* v. *Fashion Originator's Guild*, 90 Fed. (2) 556 and decision below, R. pp. 177-182). See also Nystrom—Fashion Merchandising, pp. 218-219.

Aside from the ethical detriment to the public, design piracy produces great economic waste. The rapid mortality of designs due to their reproduction in great volume and consequent loss of distinctiveness causes women's hats to become obsolete long before they have worn out.[13] While this may, to some extent, benefit the hat dealers and producers, to the public at large it means the unnecessary waste of a vast sum of money.[14]

To the woman who demands a high degree of distinctiveness, "design piracy" is a constant source of annoyance, and even the woman who wishes to wear what some fashion leader wears, is furious when she finds the same hat on the heads of a number of her acquaintances.

Furthermore, as Nystrom points out, the wide-spread practice of systematic copying down to the most minute detail, in place of originations upon a theme, deprives the public of the opportunity for a wider range of designs from which to choose, and has a tendency to mislead the public as to values.[15]

It is, of course, said that "design piracy" makes fashionable hats available to the masses, but this is of extremely doubtful truth. The "design pirate", against whom the Guild's program is directed, is the one who sells to the large retail outlets. His production is in great volume. It is thus apparent that were the cost of a designing department (less the cost of his copying department) spread over his output, the additional cost per hat, if any, would be negligible. On the other hand, the loss through returns of hats and additional cost of materials because of the small quantities in which an originator must buy his materials,

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[13] Johnston & Fitch N. R. A. Work Materials Div. Bulletin 52, pp. 57-58, 193, XV.

[14] Worthy—N. R. A. Work Materials Div. (1936) Bulletin 53, pp. 35, 38, Appendix, p. 48. Nystrom—Fashion Merchandising, p. 223.

[15] Nystrom—Fashion Merchandising, p. 223.

and because of a lack of reorders, as well as allowances for losses due to piracy, force the originator to charge more for his hats. Thus, from a price point of view, design piracy has nothing to recommend it, and certainly nothing to offset the offense to business decency which it constitutes. The conclusion of both Worthy and Johnston and Fitch, as a matter of fact, is that the presence or absence of control of "design piracy" has a negligible effect, if any, upon price.[16]

Finally, as "design piracy" causes a trend toward poorer goods and brings about monotony in design at a given time, it has hampered the growth of creation and design in this country.[17] This is well worth thinking of, particularly at the present time, for while we have depended upon foreign countries where design is protected,[18] for our inspiration and our fashion trends, we now have the opportunity to make this country a leader in design in the post war world.[19] But, for the art of design to grow and thrive, it must be encouraged and not continually beaten down by systematically destructive practices.

From the point of view of the retailer, it is also harmful. As was pointed out in *Wm. Filene's Sons* v. *Fashion Originator's Guild,* 90 F. (2d) 556, 558, "design piracy" creates dissatisfied customers and returns of goods. The retailer likewise suffers through the rapid and unpredictable obsolescence of his stock[20] for if an item becomes out of date, he is lucky to get rid of it at any price.

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[16] Worthy—N. R. A. Work Materials Div. (1936) Bulletin 53, p. 39, Appendix, p. 49. Johnston & Fitch—N. R. A. Work Materials Div. (1936) Bulletin 52, pp. 198-199.

[17] Nystrom—Fashion Merchandising, p. 223.

[18] Nystrom—Fashion Merchandising, pp. 229 *et seq.*

[19] We are all aware of the campaign of Mayor LaGuardia to seize the opportunity to make New York the fashion center of the world.

[20] Worthy—N. R. A. Work Materials Div. (1936) Bulletin 53, p. 35, Appendix, pp. 43-44.

To the originator of designs, "design piracy" is, of course, disastrous. He must invest large sums in hiring expert designers and in financing their trips to Europe to observe fashion trends and for inspiration (R. p. 92) only to have the benefits of his industry evaporate because of the loss of the quality of distinctiveness through endless and uncontrolled duplication. Because of piracy, it is virtually impossible for any creator to so much as recover his costs, much less make a net profit.[21] It is on re-orders that he must depend to stay in business and these are not forthcoming after the "pirate" has seriously commenced his work. The fact that there are but seven of the twenty-seven firms named as defendants in this action, now in business after only about four years, speaks for itself. This, although the defendants are among the recognized leaders of their trade (R. p. 92).[22]

Finally, as to the "pirate" himself, it would seem that he feels that the practice is economically beneficial to him, for otherwise he would not do it. But there is even doubt that he is benefited. In the silk industry, where a highly effective plan of combating "design piracy" has been in effect for a number of years, the former "pirates" found that when they were compelled to abandon the practice, they were not hurt but, on the contrary, were benefited.[23] This is explained by Nystrom as follows:[24]

> "The ignorance of the copyist may be seen in his belief that it is the design rather than the style that is in fashion, and in his attempt to copy the design

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[21] Nystrom—Fashion Merchandising, p. 218.

[22] Worthy estimates that the trade mortality in the Millinery Industry is about 20% per annum (N. R. A. Work Materials Div. Bulletin 53, p. IX).

[23] Johnston & Fitch—N. R. A. Work Materials Div. (1936) Bulletin 52, p. 41.

[24] Nystrom—Fashion Merchandising, p. 222.

> as precisely as possible, quite overlooking the fact that most consumers, even though wishing to be in fashion, insist on having individuality and variation in that fashion. By launching exact copies of a successful design on the market the demand for that design is quickly exhausted and large numbers of consumers desiring something different are left unsatisfied. Thus the copyist not only destroys the market for the originator but also for himself as well."

We have considered these broad aspects of design piracy in some detail because on our failure to do so below the Circuit Court hazarded various unfounded speculations upon the subject. Thus, while the Court recognized that "style piracy" is an "evil" it referred to it as "a socially desirable form of competition". This statement has not only been vigorously criticized in the reviews of the opinion,[25] but is diametrically opposed to the conclusions of the Circuit Court of Appeals First Circuit where, after reviewing the subject thoroughly, the conclusion was that the practice was socially undesirable. *Wm. Filene's Sons* v. *Fashion Originator's Guild.*[26] In fact, the opinion of the Referee in that case[27] went so far as to say:

> "That the aims of the Guild were calculated to benefit rather than prejudice public interest, I think is not open to debate."

The views of the First Circuit are in accord with those of this Court *International News* v. *Associated Press,*[28] and of the New York Appellate Division, First Department

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[25] XX Boston L. Rev. 365 reprinted N. Y. Law Journal May 4 and 6, 1940; XXII Journal of Pat. Off. Soc. 572-573; 49 Yale Law Journal 1290.

[26] 90 F. (2d) 556.

[27] 14 Fed. Supp. 353.

[28] 248 U. S. 215.

Wolfenstein v. *Fashion Originator's Guild.*[29] Exhaustive studies under N. R. A. reach the same conclusion as reached in the cases just cited, namely that "style piracy" is a most undesirable form of competition,[30] and it is noteworthy that the Federal Trade Commission has itself condemned the practice of "design piracy",[31] as do the leading magazines such as Good Housekeeping and Ladies Home Journal.[32]

TOPIC C.

What Form of Protection Is Adaptable to the Evil?

While undoubtedly there has always been a certain amount of design piracy, the situation did not become serious until a few years ago.[33] This is because modern methods of mass production prior to that time did not constitute a large factor in the production of millinery. Thus, prior to that time, the occasional theft of a design did not do any real or extensive harm. It was when the pirated idea began to be broadcast into thousands of models practically overnight, that the subject became one for serious consideration.[34] It then became necessary for industries, whose stock in trade was fashion, to look to the problem of protection.

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[29] 244 App. Div. 656.

[30] Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin 52, Worthy, N. R. A. Work Materials Div. (1936) Bulletin 53. See Appendix.

[31] See Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin 52, pp. 75-76 referring to the Trade Practice Conferences of the Federal Trade Commission of June 30, 1933.

[32] Johnston & Fitch, N . R. A. Work Materials Div. Bulletin 52, p. 43.

[33] Worthy N. R. A. Work Materials Div. (1936) Bulletin 53, p. 32, Appendix, p. 39.

[34] See Worthy "The Millinery Industry" N. R. A. Work Materials Div. (1936) Bulletin 53, p. 32, Appendix, p. 39, and Johnston & Fitch N. R. A. Work Materials Div. (1936) Bulletin 52, p. IX.

The common law gave little promise. The law of unfair competition had been developed throughout centuries under essentially different conditions and while the courts seemed to be gradually getting away from the theory that there must be a "palming off" to afford relief,[35] so rooted in the common law was that idea of "palming off", that uniform protection by the courts could hardly be looked for. But there are other difficulties under the common law. It is often practically impossible to determine who the pirate is, so as to bring action against him. Injunction was virtually useless not only because of the expense involved, but because the whims of fashion are so fleeting that before any effective relief could be obtained, the design under consideration would no longer have economic value.[36] This is particularly true because of the well known hesitancy on the part of the courts, particularly in this field, to grant injunctions *pendente lite*. In other words, the damage was done long before relief could be secured.

Similarly, the copyright and patent laws were inadequate to meet the situation. It had been held that neither the ordinary patent laws or the copyright laws applied.[37] Nor had the design patent law, enacted many years ago, been framed to deal with this particular problem. The principal difficulty under the design patent law was the time element. It is estimated that the least possible time to obtain a design patent is about nineteen days minimum, which is seldom realized, the average time being one hundred days [38] and if the design were published, in use or on

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[35] Nimms—Unfair Competition and Trade Marks (3rd Ed.), pp. 5-6, 36, 779.

[36] Nystrom—Fashion Merchandising, p. 23.

[37] *Kemp & Beatty* v. *Hirch*, 34 Fed. (2nd) 291.

[38] Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin 52, p. 77.

sale within two years of the application, the patent could not be granted.[39] The ephemeral nature of millinery designs would make such delays deadly from an economic point of view, inasmuch as the style life in the industry is only for a season.[40] And even after such delays there would be many long and costly interference proceedings.[41]

Another factor is that hundreds of thousands of designs may be created and only a very few of them may take. The creator generally will not know which of the designs will take before he has tried them on the buyers and the public, and it is upon his reorders that he must depend to stay in business.[42] Obviously, the prohibition against publication, use or sale prior to application for the design patent, when coupled with the expense of obtaining patents upon many designs that will never go into production or receive reorders, and also the delay involved, made the design patent law wholly inadequate.[43]

The further difficulty under the design patent law was that this law, being a patent law, required invention and the term invention was very strictly interpreted by the courts.[44] The designs of which we speak have originality and trade novelty, but it is doubtful that they could comply with the definition of the term "invention" which requires

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[39] *Anderson* v. *Eiler*, 50 F. 775.

[40] Worthy—N. R. A. Work Materials Div. (1936), Bulletin 53, p. 19.

[41] Johnston & Fitch N. R. A. Work Materials Div. Bulletin 52, p. 82.

[42] Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin 52, p. X.

[43] See *Cheney Bros.* v. *Doris Silk Corp.*, 35 Fed. (2d) 279, Second Circuit 1929, and Johnston & Fitch N. R. A. Work Materials Div. (1936), Bulletin 52, pp. 186-187.

[44] *A. C. Gilbert* v. *Shemitz*, 45 Fed. (2nd) 98.

that the thing be absolutely new as compared to all pre-existing things.[45]

Finally, the difficulty on the part of the Courts to appreciate the fine distinctions which, though they may be subtile, are of great economic value, has caused them to be reluctant to enter decrees affording protection.

This situation resulted in there being no effective protection afforded by recourse to the Courts.[46] If protection were to be secured, it was apparent that it would have to be either through an expansion of the common law to meet existing conditions, a broadening of the copyright laws, or through some sort of voluntary co-operation.

Little hope for effective and immediate alleviation of the difficulties of the designers could be expected through gradual development of the common law. It is a well known fact that the development of the common law is a slow process and generally well behind the development of the factors which bring about its development. It is little solace to the man whose business is being ruined today to tell him that throughout the course of the years he may hope that a sufficient body of common law may be built up, possibly by his own efforts and expense, which will, in the end, afford him the protection which is his immediate need.

Furthermore, it is difficult to imagine how the courts could ever afford effective and prompt relief. The first difficulty would be in determining the identity of the design pirate. There would then be the necessary delays of the

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[45] It should be noted that the United States is the only country which requires "invention" in industrial designs, in other countries "trade novelty" suffices. (Johnston & Fitch N. R. A. Work Materials Div. (1936) Bulletin 52, pp. 128-129.)

[46] For a summary of the difficulties which made the courts and other government agencies inadequate to handle this problem see Johnston & Fitch N. R. A. Work Materials Div. (1936) Bulletin 52, pp. XI and XII, and see 49 Yale L. J. 1290, 1292-1293, and also Nystrom—Fashion Merchandising, pp. 228 *et seq.*

judicial process and the attendant expense. The multiplicity of actions required where more than one design pirate were involved would also be a definite deterrent and, finally there would be the probable unfamiliarity of many judges with the subtleties of design. Thus, no reasonable hope could be expected in that quarter.

Because of the fundamental requirement of invention as strictly defined by the courts, the patent laws seem much less appropriate than the copyright laws as, in the latter, originality rather than invention is a controlling factor.[47] But even in the copyright field, the chance for a prompt and effective relief seemed meager. All of the difficulties just mentioned, with regard to the common law remedies, would be present under any system of copyright which might be devised. And in addition, the labeling of the goods, as required by the copyright law, would be most burdensome. However, the practical considerations would perhaps present the greatest difficulty. The registration of the hundreds of thousands of design in all of the various industries wherein design is a factor would place an intolerable burden upon the administrative branch of the government, and the fact that the courts would be forced to render decision after decision involving the fine points of the art of design would place an intolerable burden also upon the courts.

While various bills have been introduced in Congress intended to curb the design pirate, the foregoing considerations restricted greatly their actual value. It thus appeared, and now appears that the only effective method of protection would lie in the industry co-operating to clean its own house and not ask the courts to do so for it.

Johnston & Fitch in their N. R. A. studies, after recognizing the fact that in matters of design the commercial

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[47] Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin 52, pp. 97, 208.

value lies in "trade novelty", came to the conclusion that it was only through voluntary efforts that the subject of design piracy could be met. Their words on this subject were (p. 208):

> "The *sina qua non* of a successful plan based upon 'trade novelty' is the existence of a tribunal having thorough knowledge of the products of the trade and the power to make decisions acceptable by the parties concerned or capable of backing by legal sanction. In general, such a plan is adaptable only to voluntary efforts toward design control. It is wholly unadaptable to a permanent legal control."

This brings us to the plan under which the Millinery Creators' Guild set about to protect themselves.

TOPIC D.

A Description of the Petitioners and Their Plan to Eliminate the Practice of Style Piracy from the Millinery Industry.

These facts are contained in a stipulation appearing at pages 89-96 of the record.

The millinery firms who collaborated in the plan to eliminate design piracy were originators of the leading styles in the highest grade women's hats, which are sold at not less than $5.00 to $8.00 per hat (R. p. 92). As the recognized leaders in the field (R. p. 92) they employ highly paid designers who journeyed to Paris and other fashion centers of the world to observe the style trends and secure models which form a style basis for many of the designs they create (R. p. 92). About seventy-five per cent. of the hats which these houses produced were "originations" and about twenty-five per cent. were copies of French hats (R. p. 90);

made pursuant to agreement with the French designers.[48] Their preeminence in the field of millinery design is so well known that "high grade retail dealers and outlets, both in New York and elsewhere in the United States, in order to offer a full line of ladies' hats, would normally be required to procure at least some of their models from" them (R. p. 92). Proceedings were brought by the Federal Trade Commission against twenty-seven of such leading style houses. Three were able to convince the Commission that they had not been a party to the plan. The business mortality of style houses is such that seven of them failed since the commencement of the proceedings in 1936.[49] A number of defendants below have since resigned from the Millinery Creators' Guild or have not appealed so that there are now before the Court six style houses.

It is agreed that all of these firms are in active competition one with another and with the other members of the industry (R. pp. 90, 91). In fact, it would be difficult to find an industry in which competition is fiercer. Mr. Worthy's conclusions, at about the time that this proceeding was commenced by the Federal Trade Commission, and three years after the co-operative endeavor had been in effect, well illustrate this:

> "'Cut throat' is a mild term when applied to the competition existing in this industry. Possessed of little individual bargaining ability, manufacturers have no control over their own prices—let alone the price structure of the industry. They are forced to take what they can get from their distributors, and

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[48] We understand that with continental Europe closed to the American designers because of the war, they now bear the entire burden of creating new designs.

[49] Worthy states that this trade mortality is about 20% per annum (N. R. A. Work Materials Div. (1936) Bulletin 53, p. IX).

> forced to pay for their materials what their supply houses dictate. The producer is fortunate if he can cover his costs of production. The rate of industrial mortality—about 20 percent per annum—indicates that in many instances he does not." [50]

Such is the nature of the competition, however, that in the matter of capturing a particular purchaser, the originator of the design will not usually be in competition with the design pirate.[51] This is because in the millinery industry there are definite natural price fields [52] and the originators whom we represent sold only in the highest bracket. The effect of the piracy is the destruction of the economic value of the design to the originator rather than any weaning away of a customer.

Thus as Johnston & Fitch summarize the situation at page X of said report:

> "Articles bearing copied designs and on sale at lower prices than the originals quickly destroy the distinctive character of the originals. Quality or other differentials are not always evident to consumers. The original manufacturer, as a consequence, shortly finds his articles unsaleable and must turn to something else. His profits or losses on the design depend largely upon the number of items he was able to dispose of before the copy appeared and the price he was able to get, these being affected by the reluctance of distributors to place substantial orders under copying conditions, by markdowns or losses on stocks on hand, and by returns from dealers."

The plan by which the originators of the designs sought to protect themselves was through co-operation with Millinery Creators' Guild (formerly Millinery Quality Guild,

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[50] N. R. A. Work Materials Div. (1936) Bulletin 53, p. IX.

[51] 49 Yale Law Journal 1290, 1291.

[52] Johnston & Fitch N. R. A. Work Materials Div. (1936) Bulletin 52, p. 16.

Inc.), a stock corporation, the stock of which was owned by certain French milliners (R. pp. 89-90). They asked for and obtained from 1600 retail outlets throughout the United States a so-called declaration of co-operation (R. p. 93), a copy of which is found at page 102 of the record, and an agreement of co-operation was signed by those retail outlets (R. p. 93) which agreement is found at page 166A of the record.

The essence of this declaration and agreement was to the effect that the retailer approved the elimination of "style piracy", and would not knowingly deal in pirated goods. In order to protect the retailer from possible embarrassment it was provided that he would stamp on all of his orders a legend to the effect that his supplier guaranteed that the hats were not copies and that the right to return any merchandise, which was not as warranted, was reserved.

As we have said, the members of the group are in active competition with one another (R. pp. 90, 91). Neither in the plan nor in practice is there any element of price fixing allocation of markets, or pooling of designs. Each design house merely hoped to enjoy its own products without having them ruined by plagiaristic practices of others.

In order to determine whether or not a particular hat was a copy or not, it was necessary that a Registration Bureau be set up, and this was done (R. p. 93). In this connection, it is most important to note that anyone who produced an original design, irrespective of membership in the Guild, was permitted to register and obtain such protection as the Guild could give (R. pp. 93, 80) and that mere registration was not decisive as to originality (R. p. 93).

There was no pooling of designs or mutual exchange. It was each firm for itself and let competition take the hindmost, irrespective of membership in the Guild.

Any and all disputes with regard to the subject of whether a hat was an original or merely a copy of one of the registered hats was submitted to a Board of Arbitrators composed of experts (R. p. 93). Originally the Arbitration Board was composed of Guild members. However, inasmuch as they might be considered to be interested parties, the Guild proposed to the Federal Trade Commission that this be changed so as to follow the plan of Fashion Originators' Guild (R. p. 38). Under that plan, which is set forth in *Wm. Filene & Sons Co.* v. *Fashion Originators' Guild of America, Inc.*, 90 F. (2d) 556, at page 562, the Board of Arbitration consisted of a committee of retailers.[53] If the alleged violator were not satisfed with the particular committee, he could demand another committee, and if still dissatisfied, he could select one member of the Board, the Guild select the second member and those two would select a third. The merit in this plan lay in the fact that the Arbitration Board would consist of experts who were not under control of either those who were cooperating to eliminate "style piracy", or of the style pirate group.

In closing this topic we point out that petitioners are interested only in evolving an effective and fair plan to deal with the deadly practice of design piracy. The details of the plan are thus immaterial to them provided they are permitted to meet the essentials. They are not only glad to adopt the arbitration procedure of Fashion Originators' Guild, or any other helpful provisions of that plan but will be glad to adopt any suggestions of Federal Trade Commission or the Courts which will improve upon the plan to

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[53] The plan is more fully discussed in the Master's Report quoted in 14 Fed. Supp. 353, and in the Brief on the companion case—*F. O. G. A.* v. *Fed. Trade Com. No. 537.*

protect themselves against design piracy. However, the sweeping terms of the Cease and Desist order, as it now stands, forbid any cooperative measures of regulation whatsoever (R. pp. 186-187).

POINT I.

It is not the Plan of the Guild, but "Design Piracy" itself, which is unfair competition.

This Court has very definitely held that it will not permit one business concern to live on the enterprise, skill, labor and money of another.

The principal case is *International News Service* v. *Assoc. Press*.[54] There the Associated Press sought and obtained an injunction against International News Service upon the following facts:

The parties were competitors in the gathering and distribution of news, Associated Press maintained a far flung and costly organization for the gathering of news. This news was published upon bulletin boards in eastern cities and published in newspapers. It was then telegraphed to the western cities. International News adopted the practice of taking the news from Associated's bulletin boards and early papers and telegraphing it out west. There the news would reach International's newspapers in time for it to appear in the same editions as it would appear in Associated's newspapers. The news was not copyrighted or even subject to copyright. It depended for its value on its freshness, and when fresh was a valuable commodity.

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[54] 248 U. S. 215.

The analysis of this Court was that while the news itself was common property as between the news gatherer and the world at large, the business organization by which it was gathered was not public property and could not be lawfully appropriated by a business competitor.[55] As the Court put it:

> "The question here is not so much the rights of either party as against the public but their rights as between themselves. See *Morison* v. *Moat*, 9 Hare, 241, 258. And although we may and do assume that neither party has any remaining property interest as against the public in uncopyrighted news matter after the moment of its first publication, it by no means follows that there is no remaining property interest in it as between themselves. For, to both of them alike, news matter, however little susceptible of ownership or dominion in the absolute sense, is stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise. Regarding the news, therefore, as but the material out of which both parties are seeking to make profits at the same time and in the same field, we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as *quasi* property, irrespective of the rights of either as against the public."

International News had raised the point, however, that irrespective of any rights prior to publication, the publication of the news deprived Associated Press of the right to object to others making use of it. The Court showed that that argument was unsound, stating that the doctrine of

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[55] 248 U. S. 215, 235, 236.

publication applies only as between the producer and the public at large and does not apply as between two business competitors, one of whom is appropriating the stock in trade of the other (pp. 239-241).

> "The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter."
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> "publication by each member must be deemed not by any means an abandonment of the news to the world for any and all purposes, but a publication for limited purposes; for the benefit of the readers of the bulletin or the newspaper as such; not for the purpose of making merchandise of it as news, with the result of depriving complainant's other members of their reasonable opportunity to obtain just returns for their expenditures."

But the *ratio decidendi* of the case is most clearly shown in the following excerpt from the opinion of the Court (pp. 239-240):

> "In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing

of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.

"The underlying principle is much the same as that which lies at the base of the equitable theory of consideration in the law of trusts—that he who has fairly paid the price should have the beneficial use of the property. Pom. Eq. Jur., Section 981. It is no answer to say that complainant spends its money for that which is too fugitive or evanescent to be the subject of property. That might, and for the purposes of the discussion we are assuming that it would, furnish an answer in a common-law controversy. But in a court of equity, where the question is one of unfair competition, if that which complainant has acquired fairly at substantial cost may be sold fairly at substantial profit, a competitor who is misappropriating it for the purpose of disposing of it to his own profit and to the disadvantage of complainant cannot be heard to say that it is too fugitive or evanescent to be regarded as property. It has all the attributes of property necessary for determining that a misappropriation of it by a competitor is unfair competition because contrary to good conscience."

This case seems to be the only decision of this Court which deals squarely with this subject at hand. The decision has, moreover, stood as authority for the propositions stated

by the opinion of the Court for a matter of over twenty years.

The analogy to the facts of our case could hardly be more perfect. As one critic of the decision below put it, "They" (millinery designs) "are the *news of fashion*".[56]

Mr. Callman devotes the closing part of his article (*supra*, pp. 582-586) showing point by point the identity of the cases. Thus, he shows how both news and these designs are generally uncopyrightable and how the "evil" in each case consists in the unauthorized use of another's business organization. The Associated Press maintained a staff which gave them world coverage on news. Similarly, the Guild members, at great expense, sent their designers to the fashion centers of the world to keep in touch with the "news of fashion" (R. p. 92). He then shows how the vital thing of value in both news and millinery is the quality of freshness. This identity is likewise recognized in another criticism of the decision below, wherein the writer refers to the decision below as a "disturbing element" in a well settled field.[57]

The two conflicting Circuit Court of Appeals decisions on the subject would both seem to recognize the identity in principle. In *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild* [58] the Court based its decision largely upon the *International News* v. *Associated Press* case,[59] and in the decision below no attempt to distinguish was made (R. p. 180). The Court there merely stated that "Despite the limited holding of *International News Service* v. *Associated Press* [59] and its strictures against permitting one person to take a 'free

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[56] Callman—Style & Design Piracy Journal of U. S. Pat. Off. Soc. Aug. 1940, Vol. XXII, p. 583.

[57] XX Boston Law Rev. 365, reprinted in N. Y. Law Journal of May 4 and 6, 1940.

[58] 90 F. (2d) 556.

[59] 248 U. S. 215.

ride' on the labor and inventiveness of another, we believe that the public interest is best served by limiting the protection afforded an idea to the particular chattel in which it is embodied." Surely the characterization "limited holding" is solely the Second Circuit Court's own characterization, for this Court made it abundantly clear that it was deciding upon broad principles of equity and it did not, nor has it since, ever limited the effect of its decision, nor abandoned those principles.

As a matter of fact, this Court was required to take a far stronger position in the *Associated Press* case[60] than is necessary in this case. There the Court was asked to and did enjoin the "piracy", whereas our clients merely ask to be left alone.

Finally, while *Associated Press* v. *International News Service*,[59] is considered as a milestone in the law of unfair competition, it by no means stands alone. We say "milestone" inasmuch as this is one of the first cases to recognize that "palming off" is merely a type of unfair competition and not an exclusive definition.[60] In a case in the New York Appellate Division, First Department (1907) precisely the same result was reached. *Dutton & Co.* v. *Cupples*, 117 App. Div. 172. There the plaintiff had, for some years, published an uncopyrighted anthology of unique and artistic design, profusely illustrated by plaintiff's artists and with illuminated capitals. Defendant, by a photographic process, was marketing exact copies of plaintiff's work. A suit was brought for an injunction. In reversing an order denying the motion for an injunction *pendente lite*, the Court stated: "The right to injunctive relief in such a case is too firmly established to require citation of authorities" (p.

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[59] 248 U. S. 215.

[60] Callman "Style and Design Piracy", Journal of Pat. Off. Soc. Aug. 1940, Vol. XXII, pp. 557, 580.

176). In a concurring opinion Mr. Justice INGRAHAM explained the case with much force upon precisely the same grounds as were relied upon by this Court in *Associated Press* v. *International News.*[59] There is also, of course, *Wm. Filene's Sons Co.* v. *Fashion Originator's Guild,* 90 Fed. (2d) 556 in the First Circuit and a companion case in the Appellate Division, First Department. *Wolfenstein* v. *Fashion Originator's Guild,* 244 App. Div. 656 (1936). See also *Natl. Tel. News* v. *Western Union,* 119 Fed. 294 (C. C. A. 7—1902); *Associated Press* v. *KVOS, Inc.,* 80 F. (2d) 575 (C. C. A. 9—1935) reversed on purely jurisdictional grounds 299 U. S. 269; *Pittsburgh Athletic Co.* v. *K. Q. V.,* 24 Fed. Supp. 490 (W. D. Penn 1938); *Fanotopia Ltd.* v. *Bradley,* 171 Fed. 951 (E. D. N. Y. 1909); *Twentieth Century Sporting Club* v. *Transradio Press Service,* 165 Misc. 71; and *Fisher* v. *Star Co.,* 231 N. Y. 414. In conflict are the cases in the Second Circuit which presume to limit the *Associated Press* case to its own specific facts, and in doing so admit that this leaves a "hiatus in completed justice". *Cheney Bros.* v. *Doris Silk Corp.,* 35 F. (2d) 279; *Millinery Creator's Guild* v. *Federal Trade Commission* (R. p. 177), and *Fashion Originator's Guild* v. *Federal Trade Commission,* 114 F. (2d) 80.

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[59] 248 U. S. 215.

POINT II.

The Plan of the Guild does not violate the Federal Trade Commission Act or the Anti-Trust Acts.

The Federal Trade Commission Act[61] simply declares unlawful, unfair methods of competition. As the sole purpose of the plan of the Guild is to combat a practice which the Commission itself has condemned as unfair[62] and which was also condemned as unfair in some seventeen codes under N. R. A.,[63] it is difficult to see how the plan could amount to a violation of the Federal Trade Commission Act.[61]

The sole reason assigned by the Court below was that the plan was said to violate the Sherman Act.[64] The basic question is, therefore, whether or not this plan violates the Sherman Act,[64] or in other words: Does it constitute a conspiracy in restraint of trade or a monopoly?

As Justice Brandeis once put it, however, virtually any contract or agreement is in some respect a restraint of trade[65] and yet not all agreements between two or more parties are within the prohibition of the Sherman Act.[64] Thus, the question becomes even narrower so far as restraint of trade is concerned. A proper analysis of the question is, therefore, this: Does the plan present any of the evils which the Sherman Act was designed to prevent?[66] We think that the answer is clearly, no.

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[61] 15 U. S. C. A. 45; 38 Stat. 719, 43 Stat. 939, 52 Stat. 1028.

[62] Federal Trade Conference of Federal Trade Commission, June 30, 1933.

[63] Johnston & Fitch—N. R. A. Work Materials Div. (1936), Bulletin 52, pp. 75, 134.

[64] 15 U. S. C. A. 1, 2; 26 Stat. 209, 50 Stat. 693.

[65] *Board of Trade of Chicago* v. *U. S.*, 246 U. S. 231, 238.

[66] See *Apex Hosiery* v. *Leader*, 310 U. S. 469.

While the test has for many years depended upon the so-called "rule of reason"[67] it has recently been held that there can be no such thing as reasonable price fixing.[68] Thus it is important to ascertain whether the plan contemplates price fixing.

Again the answer is clearly in the negative. Under this plan each of the parties was to operate independently and in competition with everyone else (R. pp. 90, 91). The products of his labors were to be his own, and he could charge whatever the market would bring. He was not compelled to sell at any particular price or prices, or to share his proceeds with any of the other defendants, or anyone else. He had no obligation to purchase at any stated price, or otherwise, any products which might have a tendency to depress the market. In a word, he could charge whatever he thought the public would pay in a highly competitive market.

The Court below, of course, found no such forbidden practices inherent in the plan either in theory or practice. All the Court could say was, "It is safe to say that the members of the Guild instituted their anti-piracy campaign to protect their markets and price levels, as well as to improve business morals within the industry." (R. p. 180.) And it is noteworthy that even that statement was based upon testimony which was not a part of the record against petitioners (R. p. 181).[69] It is also worthy of note that the writer of a

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[67] *Standard Oil* v. *U. S.*, 221 U. S. 1, 52.

[68] *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150.

[69] All the petitioners stipulated their facts and then rested (R. pp. 89-101). Certain original parties refused to stipulate and tried their case upon the sole theory that they were not members of the group. Federal Trade Commission certified the entire record and it was so printed. As these non-stipulating parties did not press an appeal, they were not before the Circuit Court and it was, therefore, pointed out to the Court in the briefs of both sides that testimony which concerned only such former parties was not a part of the record. For this reason this testimony is omitted in the record before this Court, by agreement with the Solicitor General.

critical study of the decision below preceded his quotation of the above with the following: "There was no real basis, it seems, for reading in hidden and subversive purposes as the Court did when it said: 'It is safe to say' (etc.)".[70]

But even if the Court had been justified in departing from the record to speculate upon possible hidden motives of this sort, it would in no way change the situation.

This Court has held time and time again that the mere hope for fairer price levels through voluntary regulation does not render the regulation unlawful and this Court has likewise encouraged business men to "clean house" without recourse to the courts.

Thus, in *Sugar Institute* v. *U. S.*, 297 U. S. 553, 597-598, this Court recently reiterated the rule set forth by earlier cases [71] as follows:

> "Designed to frustrate unreasonable restraints, they" (anti-trust laws) "do not prevent the adoption of reasonable means to protect interstate commerce from destructive or injurious practices and to promote competition upon a sound basis. Voluntary action to end abuses and to foster fair competitive opportunities in the public interest may be more effective than legal processes. And cooperative endeavor may appropriately have wider objectives than merely the removal of evils which are infractions of positive law. Nor does the fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, require that abuses should go uncorrected or that an effort to correct them should for that reason alone be stamped as an unreasonable restraint of trade."

and the rule was again restated in *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 215.

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[70] XX Bost. Law Rev. 365; reprinted in N. Y. Law Journal May 4 and 6, 1940.

[71] *Board of Trade of Chicago* v. *U. S.*, 246 U. S. 231, 238. *Appalachian Coals* v. *U. S.*, 288 U. S. 344, 373-374.

As a matter of fact, in *Appalachian Coals* v. *U. S.*, 288 U. S. 344, it would seem that the plan, whereby 70% of the coal producers of a certain important area of production agreed to sell only through a single selling agency in order to stamp out ruinous competition, the Court may have been presented with a borderline case. Nevertheless, the opinion by Mr. Chief Justice HUGHES was concurred in by all except one of the Associate Justices.

The facts now presented are even a far cry from the self imposed regulation by the Appalachian Coal group. There, the coal producers were concerned only with practices which, while perfectly moral and above-board, were ruinous of market conditions. The sale of the coal under these conditions in no way ruined the desirability of the product. Here, quite the opposite is true. The unethical practice of "design piracy" is not so much to be feared in the sense that it will cause the public to buy "A's" product rather than "B's". The trouble lies in the fact that the wholesale copying of the article in a particular market saps the inherent value out of the original, for it is fashion which we sell and not coal or hats. It may well be that it was for this reason that Worthy and Johnston & Fitch both found that protection had little or no effect on price.[72]

One further case in this Court, of particular interest, is *Anderson* v. *U. S.*, 171 U. S. 604. There, the cattle traders of the Kansas City market formed an association to regulate the standards and practices of the business. The rules, however, forbade members to deal with non-members, but all who would abide by the rules were welcome to join. This Court held that such co-operative regulation of trade practices did not violate the Sherman Act.[64] As Mr. Justice

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[72] Worthy—N. R. A. Work Materials Div. (1936), Bulletin 53, p. 39, Appendix, p. 49. Johnston & Fitch, N. R. A. Work Materials Div. (1935), Bulletin 52, pp. 198-199.

BRANDEIS said in *Chicago Board of Trade* v. *U. S.*, 246 U. S. 231, 238:

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

and accordingly this Court has frequently upheld and encouraged regulatory measures.

Board of Trade of Chicago v. *U. S.*, 246 U. S. 231, 238;
Cement Mfrs. Protective Assn. v. *U. S.*, 268 U. S. 588;
Maple Flooring Assn. v. *U. S.*, 268 U. S. 563;
Natl Assn. of Window Glass Mfrs. v. *U. S.*, 263 U. S. 403.

The rule in New York with respect to the State anti-trust act[73] is not only in accord with the above cases, but the principles thereof have been applied to the Fashion Originator's Guild plan. *Wolfenstein* v. *Fashion Originator's Guild*, 244 App. Div 656 (First Dept. 1935).

We close this discussion of price with the following thought: One cannot imagine any regulation of trade practices or stabilization of an industry that does not in some degree look to fairer price levels. Does this mean that businessmen may never co-operate to eliminate trade abuses, moral or immoral? The answer is clearly—no, as has been repeatedly held by this Court.

Nor is any other factor of illegal restraint present in this situation. There is no allocation of markets. Everyone, whether a member of the Guild or not, is perfectly free to sell his own goods in any market he desires. There is no

[73] Donnelly Act; N. Y. Gen'l. Bus. Law, Sect. 340. (Quoted in Index.)

restriction upon production of millinery. So far as the plan and its operation is concerned, there could be fifty or fifty million hats on the market at any time.

Finally, the plan shows no likelihood of resulting in deterioration of quality. In fact, quite the reverse may be expected.[74]

The only question left for consideration is whether or not the plan is monopolistic in character. Once more, the answer is no.

There is no attempt to obtain the exclusive right or power to sell millinery in any market or part of a market. There is no attempt to concentrate the millinery industry or any part of it in the hands of a few. Everyone, whether a member of the Guild or not, may obtain the protection it affords (R. pp. 80, 93). Anyone who can design a hat may compete for the common prize; and they do compete vigorously (R. pp. 90-91).[75] All that the Guild asks is that they compete by their own skill and organization rather than by merely appropriating the skill and organization of others. Let the contest for the prize be one of skill and not of cheating.

This question was extremely well put in one of the law journal criticisms of the case below. In XX Boston Law Rev. 365, (reprinted N. Y. Law Journal May 6, 1940) the commentator had this to say:

> "The court in *Millinery Creators' Guild* v. *Federal Trade Commission* (109 F. (2d) 175) proceeded on the theory that to prevent one from stealing a style or design amounted to the creating of a mo-

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[74] See Johnston & Fitch, N. R. A. Work Materials Div. (1936) Bulletin No. 52, pp. 199-200, and Worthy, N. R. A. Work Materials Div. (1936) Bulletin No. 53. Appendix, pp. 39-53. Nystrom—Fashion Merchandising, p. 223.

[75] Worthy, N. R. A. Work Materials Div. (1936) Bulletin No. 53, p. IX.

nopoly in the originator. But is this so? A monopoly, it seems, embraces the idea of concentration of business in the hands of a few. This doesn't mean that the whole of a trade must be controlled, but it may refer also to domination of part of a trade. Could this be taken to include the situation where there are perhaps a thousand different designs of hats in the market at one time, where any individual may present his own design of the same fabric, made by the same machines, by no exclusive process? Can it be said that to grant the originator of one of these designs the exclusive use of it would be giving him any control over the market? Has he any semblance of domination over the millinery industry in respect to either price or production?"

It is now fair to ask whether, although the plan itself is free from the vice of monopoly, it is likewise free in practice.

While "the mere number and extent of production of those engaged in a co-operative endeavor to remedy the evils which may exist in an industry * * * should not be regarded as producing illegality"[76] it is interesting to note that petitioners produce only about 1% of the millinery of the United States.[77]

The record shows no tendency to crowd anyone out of the industry. Our clients merely attempt to see to it that their own designs, and those of firms registering with them, be not filched and thereby ruined and that their competitors enjoy no unfair and unearned advantage.[78]

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[76] *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 376-377.

[77] See statistics cited in 49 Yale Law Journal 1290 wherein the decision below is criticized; see also Johnston & Fitch, N. R. A. Work Materials Div. (1936), Bulletin 52, p. 173.

[78] It is true that Milgrim Hats, after joining the Guild and thereby espousing its policies, refused to abide by the basic rules of the Guild concerning design piracy, and was expelled for that reason (R. p. 95). We submit that that is what a member of any club or association may expect if he wilfully violates the rules. As there is nothing to indicate that Milgrim was denied a fair hearing on the subject, we further submit that this is no evidence of monopoly.

Mr. Worthy's conclusions on the subject of monopoly as applied to this industry are very much to the point:

> "It is highly unlikely that even the most effective control of piracy would lead to any monopolistic tendencies. Any form of monopoly is simply inconceivable in the millinery industry."[79]

In closing we note that it does not appear that the Guild or any member has ever exceeded the authority of its charter by failing to grant a fair hearing to anyone accused of "design piracy" and the offer to adopt the methods of arbitration used by Fashion Originators' Guild (R. p. 38) shows practically no chance of such thing ever occurring. Should such event ever occur, the courts will have no trouble in finding a way to deal with such a violation of the spirit and content of the plan.

Conclusion.

It is respectfully submitted the Cease and Desist order of the Federal Trade Commission and the order of the Circuit Court of Appeals, Second Circuit, affirming the said order should be reversed.

Respectfully submitted,

LOWELL M. BIRRELL,
Attorney for Petitioners.

Of Counsel:

CHARLES A. VAN PATTEN.

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[79] Worthy—N. R. A. Work Materials Div. (1936), Bulletin 53, p. 38, Appendix, p. 48.

APPENDIX.

Being the portion of Worthy—N. R. A. Work Materials Div. (1936) Bulletin 53, dealing with Design Piracy (pp. 32-43).

A. Style Piracy

1. *General Considerations.*

The most spectacular of the economic consequences of style is "style piracy". This term has been defined as a practice which "consists in the copying, without authorization from the creator or producer, of ornamental designs for industrial products created or introduced by others, and the selling in competition with such creator or producer, of products embodying the copied designs." (*)

(a) *Extent of Copying.*

Although the unauthorized copying of designs is at least as old as the industry itself, style piracy as a widespread practice, is of recent origin. It has shown a remarkable growth during the last six or seven years until from being, as it originally was, little more than a sporadic annoyance, it is now a thoroughly organized method of production and distribution. Lacking any effective check, legal or otherwise, piracy is today one of the dominant forces at work in the industry.

There are only a handful of houses which make any great effort to create new and original designs; all other members of the industry depend almost entirely on these houses for their styles. Styles which are apparently successful are quickly copied, reduced in price and quality, and put out in such numbers as frequently even to destroy the

(*) A. C. Johnston, N. R. A. Trade Practice Studies Section, Style Piracy Study.

markets for which they are intended. It is a common thing for an individual style to run swiftly through the industry's entire price range by means of a series of rapid and unauthorized reproductions. This cheapening process is achieved by lowering the standards of material and workmanship, as well as by the economies of large scale production and the absence of designing costs.

(b) *Methods of the Copyist.*

The copyist is an ingenious person. His methods are many—some of them crude, some frankly dishonest, others clever to a degree. The most common of all methods is simply the purchase in the retail market of the models to be copied. A distributor frequently brings to a manufacturer samples purchased from an originating house for reproduction at lower prices. Resident buyers and the buying syndicates in particular have been charged with frequent indulgence in this practice. (*)

Fashion exhibits and style shows provide excellent opportunities for the copyist. Their activities in this field finally became so flagrant that rules prohibiting actual sketching became necessary. Such prohibitions, however, have done little to stop pirating, because an expert copyist can memorize the details of a design and reproduce it at his leisure. The window displays of retail shops are also an important source of the copyist's styles for the season.

Free lance designers, whose services are often utilized by several establishments concurrently, have sometimes disclosed to one firm designs prepared by them for another. Copyists have been known to bribe designers and other employees of fashion originating houses, so that in spite of all precautions the pirate is sometimes able to exhibit copies

(*) See Seligman, E. R. A., Op. Cit.

at reduced prices simultaneously with the appearance of the original model. By bringing pressure to bear on manufacturers of hat blocks, manufacturers are sometimes able to secure copies of blocks produced for others and to turn out a hat identical with that of the originator.

(c) *The Question of Control.*

Whenever a designer conceives of a new way to work an old idea, the question of ownership is immediately raised. One group holds that the originator is entitled to a monopoly on his creation; the other contends that all designs, no matter by whom or when created, are public property and that no individual is entitled to exclusive right thereto.

The millinery industry is sharply divided over this question. Holders of the first view are for the most part the "high style" houses who each season go to considerable effort and expense to develop original designs. Adherents of the second view are for the most part the rank and file of the industry who depend almost entirely on the creative work of others. Each group has a vital economic stake in the question of control. Under present arrangements, the originator, at best, is deprived of the full benefit of his creation; at worst, he finds his capital so far depleted as to be able no longer to continue in business. For their own protection, therefore, the originating houses have attempted during the last few years to develop means for curbing the activities of the pirate. In these attempts they have, naturally enough, been vigorously opposed by the rank and file of the industry, who sincerely believe that only through unrestricted copying can they meet competition. Of all the internal conflicts to which the millinery industry is subject, none is so deep-seated or so bitter as that raging about the question of controlling style piracy.

2. *The Case for Control.*

(a) *Ethical Aspects.*

Proponents of plans for design protection make out a very good case for themselves on ethical grounds. The laws of this country are such, they point out, that if a man steals a hat he has committed a crime, whereas if he copies the style of that hat in its most minute detail he is entirely within the law—this notwithstanding that the value of the hat lies not nearly so much in its physical substance as in the intangible elements of its style.

"The present lack of a design registration law and the fact that copying is still considered a lawful activity by the courts amount to a right to despoil the business of others. It is entirely illogical that this condition be allowed to continue." (*)

(b) *Style Origination and Demand.*

All parties agree that the industry is peculiarly dependent upon a multiplicity of styles. A small fraction of the millinery now manufactured would suffice the needs of American women if all they looked for in their hats were a useful head-covering. Notwithstanding this general agreement, however, both originators and copyists claim credit for this essential multiplicity.

In order to have an industry at all, say the originators, there must be style creation, and that creation, to be maintained, must be protected. What the patent laws are to the inventor and the copyright laws to the author, the proper type of design protection would be to the creative designer. The United States is far behind other countries in the field of industrial art, and this backwardness is believed by many

(*) Nystrom, Paul H., *Fashion Merchandising*, p. 243.

to be due to the dominance of the copyist and the inability to secure to the creator the fruits of his labors. If styles were protected in this country—the argument proceeds—the designer would have a much more powerful incentive to produce original models, and demand would be considerably increased by enhanced consumer interest.

As matters stand now, however, the originators are rapidly losing ground because of the unequal odds of the competitive struggle. The creators of millinery styles labor under enough inevitable handicaps at best. Leadership in fashion may be purchased only at a very high cost. It involves the expense of experimental work, for every style introduced is of necessity an experiment in consumer demand. A high proportion of such experiments cannot help but turn out badly. Expensive designing staffs must be maintained and constant touch must be kept with European centers. The economies of mass production are impossible and manufacturing costs must be spread over the relatively small number of hats produced in styles found successful. When the disadvantages of style piracy are superimposed upon these inherent conditions, it is small wonder that the creating houses are being driven from the industry. Ultimately, the argument concludes, unrestricted copying will lead not only to the destruction of the originator but to the defeat of the copyist himself through the failure of the industry to provide that excellence of design demanded even in the lowest-priced merchandise.

(c) *Effect of Piracy on Distribution.*

According to the proponents of design protection, the prevalence of style piracy is largely responsible for the excessive rate of merchandise obsolescence and consequently for much of the depressed state of the millinery market. The more rapidly merchandise becomes out-moded the more

difficult the adjustment of production to distribution and consumption. Millinery values are largely dependent upon day-to-day changes in style. If the number is out of date, the seller, whether manufacturer or retailer, is fortunate if he is able to dispose of it at any price.

The retailer suffers with the manufacturer in this respect. As a matter of fact, style piracy is at the root of much of the returned goods evil, as well as the cancellation of orders evil, which beset this industry. Piracy has played a far more serious part in business failures than has been acknowledged. The yearly loss to the industry, in the form of obsolescent stocks, returned merchandise, and canceled orders must run into the millions of dollars. It is a loss which affects the copyist no less than the originator. It is a loss the industry can but ill afford.

(d) *The Consumer Interest.*

According to the proponents of control, the curtailment of piracy would benefit the consumer in several ways. First, the average woman makes an investment not only in material and workmanship, but, what is more important to her, in style. At least 70% of the value of any piece of outer wearing apparel consists of this intangible in a woman's mind. (*). To purchase an item in millinery, therefore, which she believes to be an individual acquisition, and later to find it copied in inferior workmanship and material and in endless duplication, destroys the greater part of the satisfaction which she has looked to secure.

In the second place, excessive copying makes it necessary for the consumer to pay higher prices than would otherwise be the case. If piracy were controlled the orig-

(*) M. D. C. Crawford, Consumers' Advisor, Millinery Code Hearings August 1 and 2, 1933; undated memorandum addressed to Deputy Administrator Earl Dean Howard, Central Records Section.

inator would be able to produce more of the hats he designs. He would purchase his materials in greater volume and consequently at a saving; his factory organization would be more stable and less time would be lost in shifting from the production of one style to another; the output of his employees would be increased by limiting their work to a smaller number of styles. All these economies would make possible lower prices to the consumer.

In the third place, excessive copying reduces the quality of material and workmanship going into the industry's product. The trends of competition are toward the poorest and cheapest that may be produced rather than to the best that will be accepted.

3. *The Case Against Control.*

(a) *Effect of Copying on Demand.* Agreeing with the proponents of control that the industry depends for its volume on a multiplicity of styles, the copyists claim for themselves the credit for that multiplicity. The rapid obsolescence of styles which is one of the consequences of piracy, they point out, increases the necessity for the constant creation of new styles. The freedom to imitate designs, moreover, has enabled manufacturers of low-priced merchandise to make available to the great mass of consumers the latest and cleverest style innovations at prices within reach of the most modest purse.

Design protection would also, it is held, decrease the demand for higher-priced millinery. The desire of women of better financial means for exclusiveness in their millinery causes them to buy a large number of hats each season. The speed with which imitations are made and the great numbers in which they are sold quickly deprive the new hat of its individuality and thus furnish the makers of more expensive

headwear not only a stimulus to constant creation but also a market for their newly designed merchandise.

(b) *The Consumer Interest.* The copyists maintain that it has been primarily through their efforts that stylish millinery has been made accessible to the average consumer. A curtailment of their activities would create a condition out of line with our ideas of democracy. Visitors to this country are constantly amazed at the ability of the average American woman to dress in the height of fashion. European countries, having design protection, make this impossible. It is possible only where copying is easily and quickly done. A tendency toward social stratification with considerable consumer resentment would be the inevitable result of any attempt to abolish piracy.

(c) *The Administrative Problem.* The copyists maintain that the administrative difficulties confronting any conceivable program of control are insuperable. There is, first and foremost, the problem of defining in general terms what constitutes piracy and determining in specific instances whether a given hat is a copy. There are few designs which are in a strict sense original. The vast majority are simply variations on old themes.

Keeping in mind that the industry is one in which styles change with great rapidity, what recourse would a manufacturer have from an adverse decision of an administrative body? By the time the controversy could be settled, the style would be worthless. In view of this rapidity of style change, furthermore, would it be possible to set up an agency capable of handling the multitude of styles produced during the few short busy weeks of the year? It is also reasonable to suppose that manufacturers would file not only a vast number of different designs but also a multiplicity of variations on each such design, both to protect themselves

and, possibly, to preempt the field on those particular types. The result would be a tendency to monopoly as well as the imposition of an impossible burden on the facilities of the registration bureau. No system could possibly work which did not render immediate service. Forty-eight hours would have to be the absolute maximum time for filing, and even this period is a long time to ask a manufacturer to hold off production in the height of the season. The work of the agency would expand and contract with seasonal activity. It would have to be so organized as to handle literally thousands of registrations during a few weeks of the year and to remain comparatively idle during the slow months.

Finally, by what means would such an agency enforce its decisions? In the last resort, it must fall back on the courts. In an industry where styles are changing so rapidly, any such means of enforcement cannot be effective. Long before the matter could be scheduled for hearing, the style would be worthless.

4. *Critical Evaluation.*

The most interesting feature of this debate on control is the claim of both factions for the credit of maintaining demand for the industry's product. These conflicting claims are not incompatible, however. Both the originator and the copyist contribute to the diversity of styles. There are two distinct types of diversification involved. Originators are largely responsible for the diversification of styles offered in the market at any given *instant* of time; copyists are largely responsible for the multiplicity of styles offered during the course of any given *period* of time. The copyist, in other words, is responsible for the rapid *succession* of styles, the creator for the *number* of styles which constitute these successive "waves".

The distinction is important, and may be the key to an intelligent decision between the contentions put forward by each faction. Notwithstanding the lack of sufficient information on which to determine conclusively which type of diversification leads to increased consumption, a tentative conclusion may be broached. On the face of it, the copyist seems to have the better of the argument, because it is his activity which brings about the rapid obsolescence of style and consequently the necessity on the part of the consumer for more frequent purchases in order to keep pace with rapidly changing fashions. It is obvious, however, that this type of diversification is purchased at too high a cost. It is also probable that the diversification contributed by creators would provide sufficient consumer demand without exacting such tremendous tolls in the form of obsolescent merchandise. Piracy contributes substantially to the high degree of instability which besets the industry. It might very well be that it could afford some diminution in the rate of style turnover in exchange for more stable conditions. From the point of view of the consumer, the type of diversification contributed by the copyist is definitely undesirable. Style changes at best impose a considerable social cost and an artificially rapid rate to turnover can only be viewed as an unnecessary waste.

It is highly unlikely that even the most effective control of piracy would lead to any monopolistic tendencies. Any form of monopoly is simply inconceivable in the millinery industry. A prohibition of copying would probably increase the manufacturer's capital requirements and thereby prove a hardship to the "bankruptcy fringe," as well as render entrance into the industry more difficult. Both of these results, however, would tend to increase the stability of the industry.

Nor is it likely that the abolition of piracy would result in prohibitive price increases. In the first place, the cost of installing designing departments would not be excessive. The industry during the past few years has made wage increases many times greater than could possibly be involved in employing additional designers. Such increases have been made without any substantial rise in prices. The larger volume of business done by the popular-priced houses would make it possible to spread the added cost over a wide area. The addition to unit costs would be relatively inconsequential and the cousumer would suffer little if any advance in prices. Finally, competition would not be impaired and would operate effectively to check any undesirable price increase.

Any program of control would present considerable difficulties of administration. Piracy has, however, been controlled in the millinery industry in other countries and in other industries in this country. Notwithstanding the obvious inadequacies of these plans so far as a complete elimination of piracy is concerned, they have certainly checked the practice. Evidently, no undesirable results have accrued from these curbs; on the contrary, the industries have apparently profited thereby. (*) In any event, the controls have demonstrated themselves not impossible of administration.

Granting the desirability of control and conceding its success in other lines, the conclusion still does not necessarily follow that controls in the millinery industry are practicable at the present time. For instance, there are

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(*) See Nystrom, Paul H., *Fashion Merchandising,* and *Economics of Fashion.* See also *Transcript of Hearing, Dress Manufacturing Industry,* November 15, 1934, testimony of Miss Louise L. Blunt, Director, The Industrial Design Registration Bureau, Inc. (Silk Industry), and Professor Royal Bailey Farnum, Chairman, Design Registration Bureau for Medium and Low Price Jewelry.

certain fundamental differences between the problems of the silk and millinery industries. In the first place, the elements of design are much simpler in the case of fabrics than in the case of millinery. Moreover, designs in fabrics are two-dimensional and in millinery three-dimensional. Consequently, the problem of classification is infinitely less difficult, as is the problem of determining whether a given design is an original or copy. Furthermore, the number of styles brought out in the millinery industry in any one season far exceeds the number brought out in a comparable period in the silk industry. The problems of administration, therefore, would be multiplied many fold in the millinery industry.

It is significant also that the silk industry is able to avail itself of the cooperation of converters and printers. Unless a design had been approved by the Registration Bureau, it cannot be processed. Without this extremely effective cooperation of the converters and printers it is at least doubtful that the plan could have been successful. The millinery industry, unfortunately, has no similar group whose cooperation could insure the success of a program of control.

Most important of all, the silk industry went through an extended educational process before any actual steps toward control were undertaken. The question began to be actively discussed in 1916, but it was not until twelve years later that the Bureau of Registration was organized. During this period the matter had been debated on all sides and by 1928 all factions were ready for fairly stringent regulation. Without this process of education, the work of the Bureau would certainly have been infinitely more difficult. It might even have proved impossible.

The millinery industry has not had anything like the education on the subject that the silk industry had. It certainly behooves the advocates of control to look to this angle

of the matter, for it is probable that the only permanent and effective means of dealing with the problem is by a long range program of education for producers, distributors, and consumers.

5. *Efforts to Control.*

(a) *Through Existing Law.* One of the most persistently reiterated arguments of those who oppose the various types of piracy control which are put forward from time to time, is that existing laws afford ample protection to the originator where such protection is warranted. On examination, however, existing law, both common and statutory, (*) reveal themselves completely inadequate.

The common-law applies only in such instances in which fraud, conspiracy, or larceny may be proved with respect to the methods employed in copying, and as copying may be so readily done by methods entirely within the law, the common law of unfair trade is of no assistance. The trade mark laws afford no protection to the style creator, for the trade mark as such is of little value and the thing copied is the style itself. The copyright laws have been held by the Courts to be inapplicable to designs used in commercial and industrial production. The patent laws afford protection only to things new and useful, and millinery designs have little to do with utility in the ordinary sense of the word. Finally, the design patent laws, under which one might naturally expect some sort of protection, are rendered largely inadequate because of narrow interpretations of the concept of originality, delays incident to the functioning of administrative machinery, and prohibitive costs of registration. The conclusion must be drawn that existing laws fall

(*) This discussion is based upon the cited works of Paul H. Nystrom and upon the Style Piracy Study of A. C. Johnson, Trade Practice Studies Section, N. R. A.

far short of affording adequate protection. Fashion creators have therefore turned to agitation along other lines.

(b) *The Millinery Quality Guild.* Private efforts of the millinery industry to control design piracy have been largely patterned on the Fashion Originators Guild organized in the dress industry in 1931. The Millinery Quality Guild, organized in 1934, operates through agreements with retailers in much the same manner as the Fashion Originator's Guild. These agreements bind the retailer not to purchase from any manufacturer any hat known to be a copy of a style created by a member of the Guild. The retailer also binds himself to stipulate in his dealings with manufacturers that any hat found to be a copy after purchase and delivery is subject to return. There were fourteen members of the Guild as of October 29, 1935.(*) The prices of merchandise manufactured by these members range from $4.50 to $12.50 per hat. The Guild's agreement has been signed by 1700 of the best retail outlets in the country. (**)

As to the success of the Guild, Mr. N. J. Garfunkel, its President, has this to say:

> "The degree of success has been limited, but most encouraging for the reason that we have been able, not only to maintain the principles for which this organization was created, but it has been a great stimulate and guide for the manufacturers of lower grade goods, to maintain a degree of ethics".

Fortune Magazine, reviewing the activities of the Millinery Quality Guild and of the Uptown Creators Guild (a

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(*) Information contained herein with reference to the Guild, unless otherwise specified, is based upon a letter dated October 29, 1935, from Mr. N. J. Garfunkel, President of the Guild.

(**) "$200,000,000 Worth of Hats," *Fortune Magazine,* January 1935.

group within the Quality Guild) draws the following conclusions:

> "The system has had some effect, but the members of the M. Q. G. (Millinery Quality Guild) and the U. C. G. (Uptown Creators Guild) represent only a minute fraction of the millinery business, and it is useless to expect the cheapest hat makers and the big, cheap retail outlets to sign any such agreement. They have everything to gain by copying . . . and they have nothing to lose but the goodwill of the highclass designers and retailers, for which practically enough, they don't give a damn." (***)

This rather terse conclusion is substantially accurate. It is highly unlikely that any voluntary efforts to control copying can achieve any substantial success, and the prospects of compulsory regulation, by federal statute or otherwise, are equally discouraging. For better or worse, it would appear that style piracy is here to stay and that the creative milliner must perforce adapt himself as best he may to a permanent. (*)

(***) Ibid.

(*) Efforts to control piracy through the Millinery Code will be discussed subsequently.